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Federal Communications Commission
Office of Secretary

June 17, 2003

EX PARTE -- BY HAND

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistrionix, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

**RE: Notice of Ex Parte Presentation: In the Matter of Rules and Regulations Implementing
the Telephone Consumer Protection Act of 1991, CG Dkt. No. 02-278**

Dear Ms. Dortch:

Today, June 17, 2003, Erick Laine, Chairman of Vector Marketing Corporation ("Vector"), and John Whelpley, Vector's Chief Administrative Officer, accompanied by Judith L. Harris and James P. Schulz of Reed Smith, LLP, Vector's attorneys, met with Jessica Rosenworcel, Competition and Universal Service Legal Advisor to Commissioner Copps. Subsequent to that meeting, Mr. Laine, Mr. Whelpley, Ms. Harris and Mr. Schulz met with Commissioner Martin and Daniel Gonzalez, Senior Legal Advisor to Commissioner Martin, and, separately, with Scott Bergmann, Legal Advisor to Commissioner Adelstein.

The purpose of all of the meetings was to discuss the above-captioned proceeding, and to urge the Commission to exempt direct sellers like Vector's reps from the sweep of the Commission's proposed amendments to its rules, as advocated in Vector's previously-filed documents. The substantive matters discussed in the meetings are set out in the attached presentation, a copy of which was given to each participant during the meetings.

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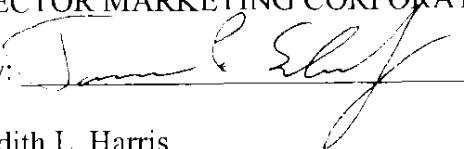
ReedSmith

The original and two copies of this notice and the attached presentation are being submitted pursuant to Sections 1.1206(b)(1) and (2) of the Commission's Rules, 47 C.F.R. §1.1206(b)(1),(2). Since the attached presentation represents a revision and expansion of the presentation made during Vector's May 28 meetings with Chairman Powell and Commissioner Abernathy, courtesy copies of the revision are also being sent to those offices.

If you have any questions regarding this correspondence, please do not hesitate to contact us.

Respectfully submitted,

VECTOR MARKETING CORPORATION

By: 

Judith L. Harris
James Philip Schulz
REED SMITH, LLP

Its Attorneys

cc: Michael K. Powell, Chairman
Commissioner Abernathy
Commissioner Martin
Marsha McBride
Bryan Tramont
Matthew Brill
Jessica Rosenworcel
Daniel Gonzales
Scott Bergmann

Do-Not-Miss on Do-Not-Call

Presentation of Vector Marketing Corporation
to

FCC Commissioners and Staff

Tuesday, June 17, 2003

What Is Vector Marketing?

- Vector is the North American marketer of **Cutco** products (high end cutlery)
- Vector is a wholly-owned subsidiary of **Alcas Corp**
 - Formed by ALCOA and W.R. Case & Sons Cutlery in 1948 - purchased by mgmt in 1982
- Cutco is manufactured by Cutco Cutlery Corp (also an Alcas subsidiary)
 - Employs 700 Steelworkers in Olean, NY

Vector's Marketing Method

- Each year, Vector recruits thousands of college students across the country and trains them as sales people
 - Company is model for several universities' business courses; academic credit for participation (Purdue, Illinois State, others)
 - Company's methods also used as case studies in several universities' course materials (U. of Texas, Boston College, Boston U., others)
- Reps are independent "Direct Sellers"
 - use telephones to set appointments--not to sell
 - call **ONLY** "personal referrals"
 - sales made through face-to-face presentations/demonstrations in the home
- Cutco products have been marketed in this same fashion for more than 30 years

Vector Is NOT Part of the Problem

Nature of Calls is Different

- Calls made ONLY to family, friends and “personal referrals”
- Calls made ONLY to set up appointments
 - selling is done through face-to-face demonstrations in the home -- **NOT OVER THE PHONE**

Method of Calling is Different

- No autodialers
- No predictive dialers
- No recorded messages
- No “blast fax” programs
- No “boiler room” operations
- **NO ANONYMITY**

Response to Calls is Different

- Calls are not unwanted
- Objective case: Vector's "Close Rates"
 - more than 50% close rate: phone calls-to-appointments
 - 1.9 calls per appointment, or a 52.6% close rate
 - approx. 50% close rate: appointments-to-sales
 - approx. 30% close rate: phone calls-to-*in-person*-sales
 - 3.6 calls per sale, or a 27.8% close rate
 - Average close rates for telemarketing industry (untargeted campaigns, phone calls-to-sales) is 1% - 3%; similar rates for spam, blast faxes
- Subjective case: Calls come from friends, relatives, *personal* connections

Why Does Vector Care About the Do-Not-Call List?

- The list could destroy Vector's business
 - By prohibiting calls to customer base
 - Customers tend to be affluent and well-educated; will be among first to “sign up”
 - Reps will have to check the list before calling their own friends and relatives
 - Since friends and relatives will be on the list, reps will be **forbidden to call their own friends and family members!**
 - **Wisconsin case: out of 9,132 *purchasers* in 2002, 4,757 (52.1%) were on that state's list in 2003!!**

Why Does Vector Care? (cont'd)

- The list could destroy Vector's business
 - By tainting Vector's activities as undesirable
 - Families, college students will shy away
 - By hindering Vector's ability to recruit
 - Perception of increased level of difficulty
 - Economic incentive will be severely impaired

Why Should YOU Care About Vector's Problem?

- Right Thing To Do
- Strengthens Commission's Constitutional Position
 - If Vector is not part of the problem, Vector should not be swept under the rule's broad reach
- Avoids duplicating (and perhaps resolves) quandary created by FTC (*see infra*)

Vector's Solution

- Narrowly-crafted exemption
- Applies only to “direct sellers”
 - who use telephones solely to set appointments
 - whose entire sales presentation is face-to-face
- Applies only to calls to “personal referrals”
 - called party must be known to caller or referring person
- Limited to 20 calls per day

Creating the Requested Exemption Would:

- Demonstrate compliance with Congress's explicit instructions
- Save any amended rule from Constitutional attack for being overbroad and, as applied to Vector, not advancing any legitimate governmental interest

In Passing The TCPA, Congress Mandated That The FCC Balance:

- The interests of telephone subscribers wishing to avoid unwanted calls AND
- The First Amendment rights of businesses to engage in commercial speech in the hope of attracting customers

(See NPRM at 2-3, ¶ 1.)

Vector Has Shown:

- Its calls are not unwanted by telephone subscribers (“close rates,” Wisconsin experience, etc.)
- Its business would be dramatically, adversely affected, and could be virtually destroyed, without an exemption.

Statutorily mandated balance tips
in favor of creating exemption, as
does analysis of relevant case law

“Central Hudson”

- Establishes Constitutional test for restrictions on *commercial* speech
- Four-part test:
 - illegal or misleading? (Restrictions OK)
 - *Substantial* government interest?
 - Does restriction *directly* and *materially* advance government interest?
 - **Is restriction *more extensive than necessary* to achieve government interest?**

Regulating Vector Does Not Advance Any Governmental Interest (*Central Hudson's* Third Prong)

- The Government bears the burden of showing that a challenged regulation advances a legitimate Governmental interest in a direct and material way. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1992).
- The asserted governmental interest under the TCPA is the protection of residential telephone subscribers' "privacy right to avoid receiving telephone solicitations to which they object." 47 U.S.C. §227(c)(1).

Vector's Calls

- Are not “solicitations” to which consumers object
 - calls are to friends and family; not anonymous
 - half of all calls from Vector's reps result in an invitation to come to the consumer's home
 - by contrast, 97%-99% of telemarketing calls GO NOWHERE!
 - 52% of Cutco purchasers on Wisconsin's No-Call list demonstrates difference between wanted and unwanted calls
- Therefore, no governmental interest in prohibiting Vector's calls

A Regulation Restricting Vector's
Commercial Speech Would Be More
Extensive Than Necessary To Achieve The
Government's Interest In Protecting The
Privacy Rights Of Residential Telephone
Subscribers (*Central Hudson's* Fourth Prong)

- *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002)
(finding unconstitutional a federal statute that sought to curtail mass production of compound drugs by prohibiting the advertising of any compound drug because it would have prevented pharmacists with no interest in mass-production of compound drugs from legitimate speech)

- *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563 (2001) (holding unconstitutional a state statute restricting the advertising and promotion of tobacco products because it needed further tailoring so as to identify particular advertising and promotional practices that targeted children while excluding and permitting those practices that were adult-oriented).
- *Rubin v. Coors Brewing*, 514 U.S. at 490-91 (holding that federal statute prohibiting beer labels from displaying alcohol content was not sufficiently tailored to the government's goals, as several alternatives were available that could achieve the same ends with less restriction of commercial speech).

- The Supreme Court has repeatedly found blanket restrictions on commercial speech to be overly broad:
 - *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983) (prohibiting the unsolicited mailing of contraceptive advertisements).
 - *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (insufficient justification for selective and categorical ban on newsracks dispensing “commercial handbills” on public property).
 - *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (state’s complete statutory ban on advertising of prices of alcoholic beverages held invalid).
- A blanket rule banning ANYONE making calls fitting the TCPA’s broad definition of “telephone solicitation” from calling any potential customer whose name appears on a National Do-Not-Call list would not be Constitutional.

The proposed rule extends to:

- All calls that have commercial content, regardless of whether or not they contain “solicitations to which [consumers] object”:
 - a son’s call to his aunt
 - a daughter’s call to her friend’s newly-engaged sister

Therefore:

- This rule is more extensive than necessary, and, as applied to Vector's reps, does not directly and materially advance the Government's asserted interest in protecting consumers' right not to have their privacy invaded by unwanted calls
- Exempting callers like Vector's reps will help to tailor the Final Rule

Granting Vector's Request Can't Hurt

- Wouldn't run afoul of cases invalidating regulations because of too many exemptions, internal inconsistencies.
 - *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) -- *entire* regulatory scheme was reviewed and deemed “irrational” because other provisions of same Act that restricted speech *directly* undermined and counteracted restriction's effect; Vector's proposed exemption fits the government's mandate to balance privacy and legitimate callers' speech, making the Commission's tool a scalpel rather than a sledgehammer.
 - *Greater New Orleans*, 527 U.S. 173, 190 (1999) -- operation of statute so “pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it” applied to prohibition of broadcast advertisements for casino gambling that had been eroded by over 50 years of conflicting Congressional actions. Vector's proposed exemption complements existing classes of reasonable exemptions (non-commercial speech, express invitation or permission, established business relationship, tax-exempt nonprofit) resulting in a narrowly tailored rule, rather than in an inconsistent or irrational scheme.

FTC's Solution

- FTC is “on board” in principle
 - FTC stated that it does not intend to enforce do-not-call provisions of amended TSR against companies like Cutco/Vector (set out in letter from FTC to Rep. Houghton)
 - substance of letter likely will be incorporated into forthcoming “Compliance Guidelines for Businesses”
- **BUT . . .**

Enforcement Intentions \neq Legality

- What's wrong with half a loaf?
 - Vector's training is often reps' first exposure to business world
 - Vector cannot train its reps by telling them:
“You don't have to follow the law because you won't be targeted for enforcement.”

Vector's Solution And Congressional Intent

- “*Do-Not-Call Implementation Act*” requires harmonization of FCC and FTC rules
- Exemption in FCC’s rules easily could be harmonized with FTC’s stated position

End result would be a narrowly
tailored rule at both agencies

Questions?